Supreme Court, U.S.
FILED
MAR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,

and

NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Did the court below err in holding that citizen suits may be brought under the Clean Water Act seeking penalties for purely past violations, contrary to the holding of the Fifth Circuit in *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392 (1985)?

PARTIES TO THE PROCEEDINGS

Petitioner and defendant-appellant below Gwaltney of Smithfield, Ltd., is a wholly-owned subsidiary of Smithfield Foods, Inc.* Respondents and plaintiffs-appellees below are Chesapeake Bay Foundation, Inc., and Natural Resources Defense Council.

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* *Statement pursuant to Supreme Court Rule 28.1*: The Smithfield Packing Company, Incorporated, Patrick Cudahy Incorporated, and Schluderberg-Kurdle Co., Inc. ("Esskay"), are also subsidiaries of Smithfield Foods, Inc.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 791 F.2d 304 and is reprinted in the appendix to the petition for certiorari ("App.") at 1a.

The opinion of the District Court for the Eastern District of Virginia (Merhige, J.) is reported at 611 F. Supp. 1542 and is reprinted in the joint appendix ("JA") at 71.

JURISDICTION

Respondents brought suit in the District Court on June 15, 1984, alleging jurisdiction under 33 U.S.C. § 1365(a)(1). App. 79a. Petitioner filed a motion to dismiss for lack of subject matter jurisdiction on May 16, 1985, which was denied by the District Court on June 26, 1985. JA 69, 119.

Petitioner appealed, and the Court of Appeals affirmed on May 22, 1986. App. 75a. A timely-filed petition for rehearing was denied on June 26, 1986. App. 77a.

The petition for a writ of certiorari was filed on September 23, 1986, and was granted on January 12, 1987. 107 S. Ct. 872. The time for filing the brief for petitioner was extended to and including March 28, 1987. Rule 29.4. The jurisdiction of this Court to review the judgment of the Fourth Circuit rests upon 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

Section 505 of the Clean Water Act, 33 U.S.C. § 1365, provides in pertinent part:

> Citizen Suits
>
> (a) Authorization; jurisdiction
>
> Except as provided in subsection (b) of this section, and section [1319(g)(6) of this title], any citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the

case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

STATEMENT OF THE CASE

Petitioner Gwaltney of Smithfield, Ltd. ("Gwaltney"), operates a meat packing plant on the Pagan River near Smithfield, Virginia. Normal meat packing operations generate non-toxic organic wastes that must be treated before discharge. Gwaltney discharges treated effluent into the River under a permit issued by the Virginia State Water Control Board ("the Board") pursuant to the Clean Water Act ("the Act"), 33 U.S.C. § 1342. The

permit imposes limits on the discharge of various substances.

Gwaltney's parent corporation, Smithfield Foods, Inc., acquired Gwaltney on October 27, 1981 from ITT-Continental Baking Company, which had originally received the Board's permit in 1974. At the time of the acquisition, Smithfield Foods received assurances from the seller that previous difficulties with the wastewater treatment system at the plant had been identified and corrected.[1] In fact, pre-existing deficiencies in the system resulted in violation of the limits in Gwaltney's permit. As Gwaltney itself reported in its discharge monitoring reports ("DMRs"), it exceeded the limits for fecal coliform/chlorine and total Kjeldahl nitrogen ("TKN") on specified occasions between October 27, 1981, and May 15, 1984.[2]

The first problem arose with the plant's chlorination system. Gwaltney was required by its permit to add chlorine to the effluent prior to discharge in order to control bacteria known as fecal coliform. Such a system must maintain a delicate balance: too little chlorine would result in exceeding the fecal coliform limit, while too much chlorine would successfully kill the fecal coliform but exceed a limit on the amount of chlorine itself. Proper functioning of the system depends upon a complex interplay between the amount of chlorine, the volume of effluent flow, and the retention time in the treatment tank necessary for the chlorine to take effect.

Gwaltney corrected the inherited flaws in the existing chlorination system by installing a new automatic chlorinator to replace the manually-operated system, install-

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[1] *See* Transcript of Proceedings at 156-157, 201.

[2] Permits issued under the Clean Water Act require the permit holder to monitor effluent discharges and determine what amounts of the substances listed in the permit are discharged. The results must be reported to the responsible regulatory authority—in this case the Board—on DMRs. *See* 40 C.F.R. § 122.41(l)(4) (1986). The DMRs are public information. 33 U.S.C. § 1318(b)(2).

ing baffles and sealing off multiple discharge points to increase retention time in the treatment tank, and replacing much of the chlorination equipment, piping, and wiring. *See* App. 90a-91a.[3] These efforts were completely successful. The last chlorine violation occurred in October 1982, twenty months before suit, and the last fecal coliform violation—other than isolated exceedences caused by the start-up of Gwaltney's new treatment system for TKN—occurred even earlier, in July 1982. *See* JA 110, 115-117.[4]

The second problem involved TKN, a measurement of the ammonia and organic nitrogen in the effluent. Bacteria found in all natural streams consume these substances and, in the process, consume dissolved oxygen, with adverse effects on aquatic life. The process is known as nitrification. App. 95a. TKN is controlled by subjecting the effluent to biological treatment in open-air lagoons. Essentially, nitrification occurs in the lagoons prior to discharge into the natural stream.

The first violations of TKN subsequent to Gwaltney's acquisition of the plant in October 1981 did not occur until three months later, in January 1982. JA 116.[5]

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[3] The parties stipulated, for example, that Gwaltney "replaced the main pump for the chlorine injector, the main controller, the chlorine control analyzer, all of the electrical wiring to the main effluent pumps, and much of the piping in the system * * *." App. 91a.

[4] The District Court recognized that the start-up exceedences were inevitable with the start-up of the system Gwaltney installed for TKN, "the best sort of system, overall, for a plant such as Gwaltney's." JA 115. In any event, the last start-up exceedence for fecal coliform occurred in February 1984, four months prior to suit. JA 117.

[5] Nitrification is affected by temperature. Biological activity slows as temperature drops, retarding nitrification. App. 93a. This occurs in the natural stream as well as the treatment lagoon, so that while violations are more likely in cold weather, they are less likely to cause environmental harm. *See* JA 47 ("what we are saying is that during the winter months, we don't believe that the violations that Gwaltney has been experiencing have adversely

After recognizing that the system was not completely treating TKN, Gwaltney undertook a major redesign of the facility. In light of the scope of the undertaking, Gwaltney retained an outside engineering firm and contacted the Board for advice and approval of its plans. After some delays beyond Gwaltney's control, including a six-month delay caused by the Board itself, *see* JA 38-41, 111, Gwaltney's new system was completed and achieved designed efficiency levels. The new system completely cured the TKN problems. As with fecal coliform, there were the unavoidable start-up exceedences, *see* JA 115, but, as the parties stipulated, the last TKN violation of any sort occurred on May 15, 1984. App. 86a, 87a, 93a.[6]

On June 15, 1984, however, respondents Chesapeake Bay Foundation and Natural Resources Defense Council filed suit against Gwaltney under the citizen suit provision of the Act, 33 U.S.C. § 1365. The suit was based on the permit violations reported by Gwaltney in its DMRs, which were appended to the brief complaint. App. 82a-83a. Respondents requested that the court declare Gwaltney "to have violated and to be in violation" of the Act, issue an injunction banning future violations, assess maximum civil penalties, and award attorneys fees—as well as witness and consultant fees—to respondents. App. 83a-84a.

Gwaltney did not contest the validity of its DMRs, and the District Court entered summary judgment on liabil-

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effected [sic] the water quality because during the winter dissolved oxygen in the river isn't critical") (T. Switzer, State Water Control Board).

[6] A DMR filed in October 1985—several months *after judgment* in the District Court—indicated an exceedence of the TKN limit at that time, an excusable "upset" caused by record flooding associated with Hurricane Gloria in September 1985. *See* 40 C.F.R. § 122.41(n) (1986). Gwaltney immediately reported the exceedence to the Board, conforming to the established procedures for handling such upsets. The Board appropriately did not take any action against Gwaltney for the excusable upset.

ity. JA 59.[7] The parties thereupon entered into a lengthy stipulation. Although the citizen suit provision authorizes suit against any person "alleged to be in violation" of limitations in a permit issued under the Act, respondents stipulated that the last violation by Gwaltney occurred on May 15, 1984, a full month prior to suit. App. 86a, 93a; *see* App. 6a n.7, 7a.

On May 16, 1985, Gwaltney moved to dismiss for lack of jurisdiction over the subject matter. JA 69. Gwaltney argued that the citizen suit provision is limited by its express terms, structure, and legislative history to actions brought to abate ongoing violations, and does not cover purely past violations. Since Gwaltney had cured the deficiencies in its treatment system and was in full compliance with the Act well before suit, the jurisdictional predicate for commencing a citizen suit—that the defendant "be in violation"—was not satisfied. On June 26, 1985, the District Court issued an opinion denying Gwaltney's motion and assessing a penalty against the company of some $1.3 million. JA 71.[8] It was the largest penalty ever assessed in a citizen suit.

Gwaltney appealed, and the court below affirmed. The court regarded the statutory language as "ambiguous" and felt compelled to "look beyond the language itself." App. 8a-9a. The court ruled that "an expansive reading of the jurisdictional grant" in the citizen suit provision

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[7] The court subsequently modified its order to limit Gwaltney's liability to violations occurring after October 27, 1981, when Gwaltney acquired the plant. JA 61.

[8] The court assessed penalties of approximately $1 million for fecal coliform/chlorine violations and $300,000 for TKN violations. JA 110, 115. The court imposed these penalties despite its recognition that any economic benefit to Gwaltney from the past violations was limited to $55,522, or less than five percent of the total penalty amount. JA 110, 112. Although the issue of the calculation of the amount of the penalties is not before this Court, the penalties imposed in this case demonstrate the extraordinary financial hazards companies will face, even after good-faith *and successful* efforts at compliance, if the decision below is allowed to stand.

was necessary to effectuate the policies underlying the Act. App. 12a. The court embraced such a reading because of its view that "a significant deterrent would be lost if citizen suits seeking civil penalties for past violations were not permitted." App. 10a. According to the court below, "[i]t can hardly be questioned that the EPA has authority to bring suit for civil penalties for purely past violations," and "the scope of citizen enforcement powers must, in this important respect, be viewed as coextensive with the enforcement powers of the EPA." App. 10a. The court dismissed statements in a decision of this Court "that might be read as limiting the scope of citizen suits" as "mere dicta" that it declined to follow, adopting instead a jurisdictional interpretation that it regarded as more consistent with "the importance of citizen suits as an enforcement tool." App. 16a, 12a. The court held that "citizen suits like the one at bar, seeking civil penalties for permit violations committed entirely in the past, are permitted under section [1365(a)]." App. 17a.

SUMMARY OF ARGUMENT

Citizen suits may be commenced under the Clean Water Act only against dischargers "alleged *to be in violation of*" the Act. 33 U.S.C. § 1365(a) (emphasis supplied). The plain language of the statute establishes an ongoing violation as a jurisdictional prerequisite to suit, and precludes citizen suits seeking penalties for purely past violations. A discharger whose violations have completely abated because he has remedied the underlying causes of past violations cannot be considered "to be in violation" of the Act, and accordingly a citizen suit may not be commenced against him.

Reading the citizen suit provision as written promotes the purposes Congress intended it to serve and is fully supported by the legislative history of the Act. Congress intended the citizen suit to be a limited supplement to government efforts to secure abatement of pollution. *See Middlesex County Sewerage Auth.* v. *National Sea*

Clammers Ass'n, 453 U.S. 1, 14, 17-18 (1981). The Act requires would-be citizen plaintiffs to notify government authorities and alleged violators sixty days prior to suit, to afford the government an opportunity to take action "to require compliance," 33 U.S.C. § 1365(b), and to afford the violator an opportunity to abate the violation. This structure presupposes the existence of an ongoing violation before a citizen suit may be maintained. Throughout consideration of the Act, Congress referred to citizen suits as abatement actions. While civil penalties may be awarded in such suits, they must be based on abatement of an ongoing violation, for the citizen suit provision "authorizes only prospective relief." *Middlesex County*, 453 U.S. at 6. When violations are not ongoing but have already completely abated, a citizen suit seeking penalties for the purely past violations does not serve the purpose intended by Congress.

Gwaltney's violations completely abated before suit was filed because it undertook—long before suit or notice of suit—substantial improvements in its treatment systems, completely curing the underlying causes of the past violations. Chlorination problems—which accounted for $1 million of the $1.3 million penalty—were fully resolved twenty months prior to suit. Gwaltney completed construction of a new treatment system for TKN in October 1983, eight months prior to suit, and the start-up violations associated with that new system—which the District Court recognized were inevitable—ceased one month before suit. JA 115. Such start-up violations cannot support the existence of an ongoing violation. Gwaltney was in full compliance with the Act when suit was filed and thus could not be considered "to be in violation" under the terms of the statute.

Ignoring the statutory language and permitting citizen suits for purely past violations would dramatically expand the nature of the citizen suit beyond a limited, supplemental abatement action and contribute to the burgeoning volume of such suits flooding the federal courts. There have already been over 65,000 permits

issued under the Act. The permits require dischargers themselves to report violations, and such reports—required to be made public—are generally sufficient to establish liability, as they were in this suit. The limits set in the permits presuppose some violations even under the best treatment systems, since EPA sets such limits with the recognition that 100 percent compliance is impossible. If citizen suits may be commenced for purely past violations, all that a citizen plaintiff need do is flip through the DMRs of any of the thousands of permit holders, find violations (including inevitable ones), and file suit seeking penalties of $25,000 per day, with every confidence of prevailing on liability and recovering all attorneys fees and expenses. There would simply be no reason *not* to sue, particularly since suit can be and often is used to secure a settlement benefiting the plaintiff, contrary to congressional intent that all penalties under the citizen suit provision go to the Treasury.

Such a result is clearly contrary to the limited role for citizen suits envisioned by Congress. These untoward consequences of ignoring the plain meaning of the statute cannot be avoided, as the Government has suggested, by having jurisdiction hinge simply on whether the plaintiff *alleges* that the permit holder is in violation. Jurisdictional allegations—if controverted—must be proved, and the burden of proof is on the plaintiff. Congress expressly limited jurisdiction over citizen suits to actions involving ongoing violations, and could not have intended that limitation to be rendered meaningless by mere allegations that cannot be sustained. In any event, there was no reasonable basis for an allegation that Gwaltney's violations were ongoing, since it had completely cured the problems that resulted in past violations well before suit.

ARGUMENT

I. The Plain Language of the Statute Limits Citizen Suits to Ongoing Violations

This Court has frequently reiterated that "the starting point for interpreting a statute is the language of the

statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).[9] In this case, both the plain language of the citizen suit provision and the legislative intent behind it demonstrate that Congress limited citizen penalty actions to cases involving ongoing violations of the Act.

The citizen suit provision specifies that "any citizen may commence a civil action * * * against any person * * * who is alleged *to be in violation of*" a standard or limitation under the Act. 33 U.S.C. § 1365(a) (emphasis supplied). Quite simply, if the violation alleged in the complaint ceased prior to suit, the defendant cannot be considered "to be in violation" at that time.[10] Permitting citizen suits for purely past violations would require this Court to rewrite the Act to provide for actions against any person alleged "to be *or to have been* in violation of" the Act. By its express and plain terms, the citizen suit provision is limited to ongoing violations that have not abated by the time suit is filed. *See Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392, 395 (5th Cir. 1985) ("By its ordinary meaning the language of section 1365 requires an allegation of an ongoing violation").

As the First Circuit noted in *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 807 F.2d 1089, 1092 (1986), *petition for cert. filed*, No. 86—— (March 17, 1987), "it would have been so easy for Congress to have said

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[9] *See United States* v. *James*, 106 S. Ct. 3116, 3121 (1986); *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 106 S. Ct. 681, 686 (1986); *Garcia* v. *United States*, 469 U.S. 70, 75 (1984).

[10] As we discuss below, the word "alleged" can have little if any legal significance apart from the phrase it modifies, "to be in violation." Where jurisdiction is demonstrably lacking, or where a lack of jurisdiction can be demonstrated by minimal proof, a mere allegation cannot supply what does not exist. To hold otherwise would force a trial court to ignore the facts before it and give pivotal significance to a few words the plaintiff has inserted, without basis, in his complaint. *See infra* at 37-43.

'has violated,' instead of 'is * * * in violation' if the former was its intention, and with the difference being so conspicuous." [11] Congress chose to limit citizen penalty actions to those cases in which the permit holder is "in violation." If that provision is to be changed, "it should be by Congress and not by this Court." *United States* v. *James*, 106 S. Ct. at 3125. Gwaltney's violations were not ongoing but rather were completely abated before respondents filed suit. Not only had the violations ceased but the underlying causes of the violations—the inherited inadequacies in the chlorination and biological treatment systems—had been completely cured. Respondents thus failed to satisfy the jurisdictional prerequisite that the defendant "be in violation" before commencing their citizen penalty action.

It is particularly important to adhere to the plain language of statutory enactments conferring jurisdiction on the federal courts. These are courts of limited jurisdiction, and have only such jurisdiction as is conferred by Congress. This Court has recognized its " 'duty * * * to see to it that the jurisdiction of the [district court], which is defined and limited by statute, is not exceeded.' " [12]

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[11] Congress knows how to provide for citizen suits seeking civil penalties for purely past actions when it wants to. To cite an example from the environmental area, the Solid Waste Disposal Act, 42 U.S.C. § 6972(a)(1)(B), authorizes citizen suits "against any person, * * * including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." Since Congress unambiguously authorizes citizen penalty suits for purely past actions when it intends them, this Court should not discern such an intent when, as here, the plain language of the statute not only does not authorize such suits but in fact precludes them. *See Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 21-22 & n.13 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 572 (1979).

[12] *Sumner* v. *Mata*, 449 U.S. 539, 548 n.2 (1981) (quoting *Louisville & Nashville Railroad Co.* v. *Mottley*, 211 U.S. 149, 152 (1908)).

Congress did not simply grant private citizens a cause of action in federal court whenever they were aggrieved by a violation of the Act, but carefully defined and limited the grant of jurisdiction. For example, Congress specified that no citizen suit may be commenced prior to sixty days after the citizen plaintiff notifies the EPA, the State, and the alleged violator of an intent to sue. 33 U.S.C. § 1365 (b). Congress further provided that no such suit may be maintained if the EPA or the State takes enforcement action. *Id.* Congress authorized citizens to sue the Administrator for failure to perform an act or duty under the Act, but only if the act or duty is not discretionary. *Id.* § 1365(a)(2). These various limitations have been interpreted as jurisdictional bars to commencement of a citizen suit.[13] Congress also specified that a private citizen may commence a civil action only against a person alleged "to be in violation" of the Act. The statutory requirement of an ongoing violation, like the other limitations on citizen suits, is a jurisdictional prerequisite that must be met before a citizen suit may be maintained.

The Court has also emphasized the importance of adhering to the plain language of this particular statute. As Judge Wisdom has noted, "[t]he Supreme Court has demanded strict adherence to statutory provisions for citizens' suits in environmental litigation." *Garcia* v. *Cecos International, Inc.*, 761 F.2d at 81. As the Court observed

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See Boelens v. *Redman Homes, Inc.*, 748 F.2d 1058, 1067 (5th Cir. 1984) ("statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction").

[13] *See, e.g., City of Evansville* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1014 (7th Cir. 1979) (notice provision), *cert. denied*, 444 U.S. 1025 (1980); *Walls* v. *Waste Resource Corp.*, 761 F.2d 311, 317 (6th Cir. 1985) (same); *Garcia* v. *Cecos International, Inc.*, 761 F.2d 76, 81-82 (1st Cir. 1985) (identical notice provision in Resource Conservation and Recovery Act); *Sierra Club* v. *Train*, 557 F.2d 485, 491 (5th Cir. 1977) (discretionary duty of Administrator); *Connecticut Fund for the Environment* v. *Contract Plating Co.*, 631 F. Supp. 1291 (D. Conn. 1986) (state enforcement action).

recently in *International Paper Co.* v. *Ouellette*, 107 S. Ct. 805, 812, 813 (1987), the Clean Water Act is a "carefully drawn statute," with "the balance of public and private interests so carefully addressed by the Act." Rewriting the statute to confer jurisdiction over citizen penalty actions against those alleged "to be *or to have been* in violation" would disrupt the balance struck by Congress in this "carefully drawn statute."

In *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), this Court emphasized the importance of adhering to the plain language of the very citizen suit provision at issue here. In that case, the Court rejected arguments that the language of a savings clause in the citizen suit provision should be read expansively to implement the purported intent of Congress. The Court emphasized that "[w]e * * * are inclined to view the [savings clause] as meaning what it says" and that "[w]e prefer to read the statute as written." *Id.* at 328, 329 n.22.

Although this Court has not directly considered the question presented in this case, it has consistently regarded the citizen suit provision as addressed to ongoing violations rather than those that have ceased prior to suit. In *Middlesex County*, 453 U.S. at 6, the Court recognized that the citizen suit provision "allows suits under the Act by private citizens, but authorizes only prospective relief * * *." Civil penalties for violations that have abated before suit is filed obviously do not constitute "prospective relief." Accordingly, suits claiming civil penalties for totally abated violations cannot form the basis of an action under the citizen suit provision.[14]

In *International Paper*, *supra*, the Court outlined the remedies provided under the Clean Water Act, including

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[14] *See also City of Evansville* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d at 1014 (citizen suit "provision authorizes a civil action against a party 'alleged to be in violation' of effluent standards or limitations * * *. It does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past").

" 'citizen suits' that allow individuals * * * to compel the EPA to enforce a permit." 107 S. Ct. at 812. Referring to the availability of relief to the private citizen respondents in *International Paper*, the Court noted that "[i]f, as was also alleged in respondents' complaint, IPC *is violating* the terms of its permit, respondents may bring a citizen suit *to compel compliance*. 33 U.S.C. § 1365." 107 S. Ct. at 815 n.18 (emphasis supplied). Here, of course, Gwaltney had ceased "violating the terms of its permit" prior to suit—following installation of a new and expensive treatment system—and accordingly a citizen suit could not be brought "to compel compliance." Compliance had already been achieved.

The court below rejected adherence to the plain meaning of the statutory language because it found that language ambiguous. App. 8a. This view was not shared by the two other Courts of Appeal that have addressed the present question. The Fifth Circuit in *Hamker* rejected the contention "that 'to be in violation of' means 'to have violated' " because it "obviously strains the grammar of the statute and diverges from its ordinary meaning." 756 F.2d at 395. The court concluded that the "ordinary meaning" of the statutory language "requires an allegation of an ongoing violation." *Id.* The First Circuit in *Pawtuxet Cove* stated that "[w]ith great respect to the Fourth Circuit, we find its conclusion of ambiguity unpersuasive * * *." 807 F.2d at 1092. While the First and Fifth Circuits disagreed slightly over precisely how to define "in violation," both agreed that the statutory language was "addressed to the present." *Pawtuxet Cove*, 807 F.2d at 1091.[15] Whatever disagreement may exist

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[15] The Fifth Circuit in *Hamker* held that there was no jurisdiction over a citizen suit seeking penalties for an oil pipeline leak when the pipeline had been repaired and the leakage problem fully abated prior to suit. 756 F.2d at 394-395. The First Circuit in *Pawtuxet Cove* affirmed the dismissal of a citizen suit for lack of jurisdiction when the citizen suit sought penalties for past violations, and "there was no reasonable likelihood that [the] alleged infractions would continue." 807 F.2d at 1094. The First Circuit's test for jurisdiction focused on whether "it is reasonable to believe

over precisely what constitutes an ongoing violation sufficient to satisfy the jurisdictional requirement that the defendant "be in violation," such disagreement does not grant license to ignore the requirement altogether and embrace an "unlimited meaning" of the statute, conferring jurisdiction over purely past violations. *Id.* at 1092.[16]

Respondents argued below that reliance on the plain meaning of the statute would lead to absurd results, allowing persistent violators of the Act to escape liability unless they happened to be "surprised in the physical act of violating the Clean Water Act at the moment the complaint is filed."[17] This argument attacks a straw man. The jurisdictional prerequisite that the permit holder "be in violation" requires that there be an ongoing violation before a citizen suit may be commenced; it does not require an exceedence of a permit limit on the precise day suit is filed. The chronic episodic violator who fortuitously avoids a permit exceedence on the

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that misconduct will continue" when suit is filed. *Id.* Both formulations—contrary to the holding below—give substance to the "in violation" requirement in the statute. Jurisdiction is lacking in this case under either the Fifth or First Circuit approach, since not only did Gwaltney's violations cease before suit but Gwaltney completely cured the problems that had resulted in the past violations well before suit.

[16] The court below suggested that the phrase "in violation" could cover purely past violations, in the same sense that a taxpayer who underpaid one year, but not the next, continues to be "in violation" of the tax laws. App. 9a n.10. The First Circuit, however, correctly found

> the argument forced, and the analogy inapt. In the case of the taxpayer, the violation was the non-payment, and it, of course, continued until the obligation was met. A ceased improper discharge does not "continue." Moreover, the "violation" defined by the statute is not the non-payment of the penalty.
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> Nor does the statute speak in terms of "taint." This might be arguable if it had read "is a violator," but "is * * * in violation" speaks in terms of activity. [*Pawtuxet Cove*, 807 F.2d at 1092.]

[17] Br. of Plaintiffs-Appellees below at 20.

day of suit can properly be brought within the statute without treating "to be in violation" as if it read "to be, or to have been, in violation."

While some courts confronted with the problem of the chronic episodic violator have abandoned the plain language of the statute altogether, others have recognized that the language can include the chronic episodic violator without conferring jurisdiction over those whose violations have completely abated. Thus, the First Circuit has observed that "the words 'is * * * in violation' should be sufficiently liberally construed to comport with the injunctive purpose of the Act—conduct indicative of continuing or renewed violations justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one." *Pawtuxet Cove*, 807 F.2d at 1093. Similarly, Judge Williams has pointed out that "the requirement that the polluter be 'in violation' clearly is broad enough to cover the chronic episodic violator." *Hamker*, 756 F.2d at 399 (Williams, J., concurring). In *Sierra Club* v. *Kerr-McGee Corp.*, 23 Env't Rep. Cas. (BNA) 1685 (W.D. La. 1985), a court applying the *Hamker* rule declined to dismiss a suit in which a series of exceedences—attributable to the same cause—occurred intermittently on various days up to the time of suit, even though there was no exceedence on the day suit was actually filed. The court held that the facts could support the existence of an "ongoing violation" such that the defendant could be held "to be in violation" under the Act. *Id.* at 1690; 33 U.S.C. § 1365(a). Such a holding does not depart from the plain language of the statute—which requires that the defendant "be in violation"—but simply recognizes that a permit holder is "in violation" when discharges exceeding permitted levels continue unabated up to the time of suit, even if they do not occur on a daily basis.

There is a profound difference between the permit holder who has violated the permit in the past but corrected the situation so that the violations have completely

abated, and the permit holder who has repeatedly violated in the past and continues to operate the system in the same manner, taking no action to abate the continuing violation. There is a *reason* the former did not exceed any permit limits on the day in question: he is not "in violation;" the violation has abated. There is no reason the latter did not exceed any limits, other than happenstance: his violation is ongoing, and accordingly he may be considered "to be in violation" under the terms of the statute.

In light of the foregoing, there is no merit to respondents' contention that reading the statute as written would impose serious practical burdens on citizen plaintiffs. For example, respondents have argued that DMRs often do not require daily sampling, so that it may be difficult to determine if the defendant exceeded the permit on the day suit was filed. Such a determination is not required.[18]

According to respondents, the lag time in the filing of DMRs means that citizen plaintiffs can never be certain if a violation is occuring when they file suit. Therefore, respondents reason, jurisdiction should be found even if the defendant is not in fact "in violation" when suit is filed, to avoid thwarting the plaintiffs' "expensive and time-consuming preparation for litigation." Br. in Opp. at 26-27. This purported problem only arose in this case, however, because Gwaltney achieved full compliance with the Act before suit was filed. It seems a curious argument that the parties and the courts should be put through

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[18] If the frequency of sampling ever becomes a practical problem, the enforcement authorities are free to require more frequent or even daily samplings in the permits they issue. The Clean Water Act authorizes the Administrator to require permit holders to establish and maintain such records of effluent discharges and to make such reports as the Administrator may "reasonably require." 33 U.S.C. § 1318(a)(3)(A). *See* S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), *reprinted in* 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972* ("Leg. Hist.") 1499 (1973).

the expense and time of a full trial—after the objectives of the Clean Water Act have already been achieved—simply to avoid "thwarting" the expense and time allegedly incurred in *preparation* for trial.

Moreover, respondents plainly exaggerate the expense and time involved. The record in this case demonstrates that Gwaltney's DMRs were typically completed about one week after the end of the covered month.[19] Plaintiffs in citizen suits can thus promptly learn whether an ongoing violation exists, without any waste of litigation resources. And the expense and time involved in filing a complaint in these cases are virtually nonexistent, since the DMRs furnished by the defendants themselves generally suffice to establish a violation of the Act. *See* JA 58. The remarkable ease of filing such suits makes the brief wait for a current DMR a truly insignificant burden, particularly since jurisdiction will only be lacking when—as here—the defendant has already achieved full compliance with the Act.

In this case, there was neither a violation when suit was filed nor an unabated ongoing violation leading up to suit. Gwaltney was in complete compliance with the Act a full month before suit was filed. This was not fortuitous, but a direct result of actions Gwaltney took long before suit to correct the problems with its treatment systems that had led to violations in the past. Indeed, chlorination problems were resolved twenty months prior to suit. TKN violations ceased when the system Gwaltney completed eight months prior to suit achieved designed efficiency levels. It was evident well before suit that Gwaltney's new system—approved by the Board—would achieve compliance with the Act, as in fact it did.

The permit exceedences that occurred in the winter and spring of 1983-1984 cannot support any allegation that Gwaltney was a chronic episodic violator. The Dis-

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[19] *See, e.g.*, JA 11 (DMR for May 1984 completed June 8, 1984); JA 12 (DMR for March 1984 completed April 6, 1984).

trict Court itself recognized that those exceedences were the necessary result of the start-up of Gwaltney's new system. *See* JA 110, 115. As the court concluded:

> According to the evidence, Gwaltney's violations after starting up its new system were largely uncontrollable; there is no way to start up a biological treatment system without violations. A biological treatment system is apparently the best sort of system, overall, for a plant such as Gwaltney's. There is no evidence that Gwaltney's start-up period was greater than one would expect. [JA 115.]

Basing jurisdiction in this case on Gwaltney's unavoidable start-up violations—which, in any event, completely ceased one month prior to suit—would perversely penalize Gwaltney for installing a new, fully effective system to correct the problems it inherited. The present case is thus hardly one in which a chronic violator happened to avoid exceeding its permit upon the filing of a citizen suit, but rather one in which a citizen plaintiff exhumed purely past violations by a permit holder that had achieved full compliance with the Act.[20]

In addition to the chronic episodic violator, respondents have also raised the spectre of the violator who deliberately "turns off the spigot" immediately prior to suit. A permit holder, however, has no way of knowing when a citizen plaintiff will file suit once the notice period has elapsed, and accordingly cannot cease dis-

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[20] There would be no jurisdiction in this case under the test articulated by the First Circuit in *Pawtuxet Cove*. Gwaltney's conduct was clearly not "indicative of continuing or renewed violations," but rather indicated that the past violations were "matters over and apparently done with." 807 F.2d at 1093. Given the improvements made by Gwaltney—with full notice to and approval by the Board—it was clearly not "reasonable to believe that misconduct will continue." *Id.* at 1094. In fact, the District Court did not issue an injunction banning future permit violations, even though one was requested in respondents' complaint. App. 83a. *See Pawtuxet Cove*, 807 F.2d at 1094 (test for jurisdiction over penalty action "is precisely the showing that would induce a court to issue an injunction").

charges immediately prior to suit. To take this case as an example, respondents' notice letter was dated February 29, 1984. *See* App. 80a. Respondents could have sued at any time after April 29, 1984, but did not do so until June 15. In some cases citizen plaintiffs wait many months after they satisfy the sixty-day notice requirement to file suit. *See, e.g., Student Public Interest Research Group* v. *Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1427 (D. N.J. 1985) (one-year delay). The violator "turning off the spigot" to avoid suit not only would have to do so promptly but would also have to *keep* the spigot turned off. The end result is hardly a circumvention of the Act, but precisely what the Act was intended to achieve—an end to discharges in violation of the permit.

In any event, Gwaltney's actions in this case were hardly an effort to "turn off the spigot" to avoid a citizen suit, and neither the District Court nor the Court of Appeals suggested that they were. Far from "turning off the spigot," Gwaltney continues to discharge appropriately treated effluent into the Pagan River, pursuant to its permit. Gwaltney attained compliance with TKN limits not by temporarily suspending discharges but by installing a new, state-of-the-art wastewater treatment system. Gwaltney began planning that system two years before respondents filed suit, and completed construction of the system eight months prior to suit. *See* JA 18, 43-44, 48-50. The separate chlorination problem was fully resolved twenty months prior to suit. *See* App. 87a; JA 100. Any suggestion that Gwaltney undertook these substantial capital improvements as a means of "turning off the spigot" to avoid a citizen suit that would not be filed for many months ascribes to Gwaltney a degree of clairvoyance for which there is no support in the record.

II. The Purpose and Legislative History of the Citizen Suit Provision Reinforce the Statutory Limitation to Ongoing Violations

An understanding of the role of the citizen suit in the statutory scheme, and of the genesis of the statutory lan-

guage, reinforces the plain meaning of the words chosen by Congress. The court below considered itself justified in adopting "an expansive reading" of the citizen suit provision because "[a]ny other reading of the Act would eliminate a significant deterrent to violations of the Act and severely undercut the Act's ambitious purpose, 'to restore and maintain the chemical, physical and biological integrity of the nation's waters.'" App. 12a, 10a (quoting 33 U.S.C. § 1251(a)). As this Court noted in considering a similar question in *International Paper*, however, "it is not enough to say that the ultimate goal * * * is to eliminate water pollution." 107 S. Ct. at 813. Such an approach would authorize courts to override "the balance of public and private interests so carefully addressed by the Act" in imposing their own views about how to promote the objective of Congress. *Id.*[21]

The inquiry into legislative purpose must focus more narrowly on the role Congress intended citizen suits to play in the regulatory scheme. As the Fifth Circuit noted in *Hamker*, "[p]rimary enforcement responsibility under

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[21] As the Court noted in *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 106 S. Ct. at 689:

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents effectuation of congressional intent.

See also United States v. *James*, 106 S. Ct. at 3121 ("'we assume that the legislative purpose is expressed by the ordinary meaning of the words used'") (quoting *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982)); *California* v. *Sierra Club*, 451 U.S. 287, 297 (1981) ("The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide").

the Act lies with the states and the Administrator." 756 F.2d at 395. Under the Act, States "desiring to administer their own permit programs must demonstrate that state officials possess adequate authority to abate violations through civil or criminal penalties or other means of enforcement." *Middlesex County*, 453 U.S. at 13. The Commonwealth of Virginia met these standards in its State Water Control Law, which authorizes the Board to require regulated companies like Gwaltney to furnish information and submit to investigation. The Board may issue administrative orders and rules, obtain injunctions and other orders in court, and impose civil penalties for purely past violations. Va. Code § 62.1-44. As noted, Gwaltney kept the Board fully informed of its plans, participated in all public meetings on the status of its work, and received Board approval of its actions.

The Clean Water Act also grants a broad array of enforcement powers to the Federal Government. The Administrator of EPA is authorized to issue compliance orders to any person found to be in violation of statutory or permit conditions, including conditions for which no citizen suits are authorized. 33 U.S.C. § 1319(a). The Administrator may also respond to violations by bringing suit, and a court in such a case may impose civil penalties. *Id.* § 1319(b), (d). The Act also authorizes criminal prosecution in suitable cases. *Id.* § 1319(c). *See Middlesex County*, 453 U.S. at 13.

Congress "supplemented" this broad array of enforcement authority granted to the States and the Federal Government by also authorizing citizen suits of a "limited nature." *Id.* at 14, 17 n.27. The court below, however, did not regard the citizen suit provision as a limited supplement to the enforcement powers vested in the States and EPA, but rather held that a private citizen's power to seek penalties for purely past violations must "be viewed as co-extensive with the enforcement powers of the EPA." App. 10a. Even assuming *arguendo* that

EPA can seek penalties for purely past violations,[22] there simply is no basis for supposing that private citizens must have the identical authority. *See Hamker*, 756 F.2d at 395 (citizen suit "section obviously does not permit the citizen to *duplicate* the Administrator's powers * * *. [T]he Administrator may have the power to seek some redress for past violations, but this is no reason to waive the statutory requirement that *citizens* must allege that the defendant is 'in violation' of an effluent standard, limitation or order") (emphasis in original).

Not only are the roles of the government enforcement authorities and private citizens distinct under the Act, but the language of the provision authorizing suit by the Administrator is significantly different from the language of the citizen suit provision. The provision authorizing suit by the Administrator, 33 U.S.C. § 1319(b), does *not* limit jurisdiction to actions against those "alleged to be in violation of" the Act. On the contrary, it authorizes the Administrator to bring suit for any violation for which he is authorized to issue a compliance order. *Id.* The Administrator may issue a compliance order when he "*finds* that any person is in violation" of the Act. 33 U.S.C. § 1319(a) (emphasis supplied). Such findings at a point prior to suit—or the authority to make such findings, even if not exercised—may support jurisdiction in a penalty suit by the Administrator for a violation that ceases before suit. The citizen suit section contains no similar provisions.[23]

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[22] That question is not presented here and need not be decided. The Commonwealth of Virginia, which has primary enforcement responsibility in this case, clearly does have the power to seek penalties for purely past violations. Va. Code § 62.1-44.15(8c) (Supp. 1986) ("the Board may proceed directly under [its civil penalty powers] for any past violation").

[23] It is significant that the United States agrees that "the jurisdictional provisions pertaining to citizen suits need not, and indeed should not, be construed in tandem with the governmental enforcement provisions." Brief for the United States as Amicus Curiae Supporting Appellants at 20, *Sierra Club* v. *Shell Oil Co.*, Nos. 85-3753, 85-3762, 85-3763 (5th Cir.) (app. pending).

The purpose of citizen suits is to help secure abatement of ongoing violations of the Act. Under the terms of the Act, prospective citizen plaintiffs must give notice to the Administrator, the State, and the alleged violator sixty days before filing suit. 33 U.S.C. § 1365(b). If the Administrator or the State responds by bringing suit "to require compliance with the standard, limitation, or order," the citizen may not commence his action. *Id.* This provision clearly links the citizen suit to an effort "to require compliance," indicating that when compliance has already been achieved—when the discharger is not "in violation"—a citizen suit would not be appropriate in the first place. If citizens could sue for purely past violations, the government could hardly supplant the citizen suit by bringing an action "to require compliance."

In addition to notifying the Administrator and the State, a would-be citizen plaintiff is required by the statute to give sixty-day notice to the alleged violator as well. 33 U.S.C. § 1365(b)(1)(A)(iii). The purpose of notifying the alleged violator is to afford him an opportunity to bring himself into compliance, and thereby avoid the necessity for a citizen suit altogether. As explained by the court in *Hamker*, "it is most reasonable to read the requirement that notice also be given to the alleged violator as an indication that where the violator responds to the notice by bringing himself into compliance, the citizen loses the right to bring suit under 1365(a), just as he loses the right to commence an action where the Administrator or the state responds by diligently prosecuting an action against the alleged violator * * *." 756 F.2d at 396. *See Proffitt* v. *Commissioners, Township of Bristol*, 754 F.2d 504, 506 (3d Cir. 1985) ("The purpose of the sixty-day notice requirement is to obviate the need for resort to the courts by prompting *either* administrative enforcement of the laws *or* voluntary compliance by alleged violators") (emphasis supplied). Thus, the requirement of notice to the violator was intended to pro-

mote abatement, and if the violation is abated prior to suit—as here—the citizen suit may not be commenced.[24]

The legislative history of the citizen suit provision reinforces the conclusion that Congress authorized citizen suits to be brought only to abate ongoing violations of the Act.[25] The Senate Report, for example, repeatedly refers to citizen suits in the context of abating violations. *See* S. Rep. No. 414, *supra*, 2 Leg. Hist. at 1499 ("citizen suits seeking abatement"), 1498 (citizens may file actions when government authorities do not take action to abate violations), 1499 (attorneys fees awardable to citizen plaintiffs "in actions which result in successful abatement").[26] The hearing record also repeatedly reflects the understanding that citizen suits were authorized only when necessary to abate an ongoing violation that either the State or EPA has not taken action to abate.[27]

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[24] *See also Garcia* v. *Cecos International, Inc.*, 761 F.2d at 82; *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 511 F.2d 809, 814 (D.C. Cir. 1975).

[25] Since both the plain language of the citizen suit provision and the structure of the statute demonstrate that citizen penalty actions are limited to ongoing violations, resort to legislative materials in search of rather than to resolve ambiguity is unnecessary. *See Rubin* v. *United States*, 449 U.S. 424, 430 (1981); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. at 108. Application of this general rule is particularly apt here because Congress "tried in this legislation not to leave the final evaluation of the bill to legislative history, but instead to write into law as clearly as possible the intent of the Congress." 118 Cong. Rec. 33693 (1972) (Sen. Muskie), 1 Leg. Hist. at 164. In any event, the pertinent legislative history simply confirms the interpretation mandated by the statutory language, structure, and purpose.

[26] *See also* 118 Cong. Rec. 10203 (1972), 1 Leg. Hist. at 347 ("This legislation allows citizens to bring civil suits against polluters alleged *to be violating* required standards") (Rep. Madden) (emphasis supplied); *Pawtuxet Cove*, 807 F.2d at 1093 n.2.

[27] *See, e.g., Water Pollution Control Legislation, Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 1st Sess. (1971) at 114 ("Any person

As the Court recognized in *Middlesex County*, the citizen suit provision in the Clean Water Act "was expressly modeled on the parallel provision of the Clean Air Act," and "the legislative history of the latter Act contains explicit indications that private enforcement suits were intended to be limited to the injunctive relief expressly provided for." 453 U.S. at 18 n.27. The purpose of the citizen suit provision in the Clean Water Act did not suddenly change with the addition of civil penalties, which were not available under the Clean Air Act. The fact that penalties may be awarded under the Clean Water Act in a suit properly brought to abate an ongoing violation, while they may not be awarded under the Clean Air Act, does nothing to diminish the force of the parallel drawn by this Court in *Middlesex County*.

The legislative history of the Clean Water Act supports this view. Both the Senate and House reports, which emphasized that the citizen suit provision was modeled after that of the Clean Air Act, noted the addition of civil penalties almost in passing. There was no suggestion that this modification altered the abatement purpose or nature of the citizen suit.[28] As Judge Aldrich concluded for the First Circuit in *Pawtuxet Cove*:

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may sue a polluter to abate a violation") (staff analysis), 707 (citizen suits "are brought for the purpose of abating pollution") (Sen. Eagleton); *Water Pollution Control Legislation-1971 (H.R. 11896, H.R. 11895), Hearings Before the House Comm. on Public Works*, 92d Cong., 1st Sess. (1971) at 369 ("retain for [citizens] the ultimate power to move against that willful polluter") (testimony of Stephen Saltzman, Washington Representative, Trout Unlimited), 439 ("citizen's suit provision permits the citizen to * * * provide with his own resources what is in essence a public benefit, namely, stopping pollution") (testimony of David R. Zwick, Project Director, Nader Pollution Control Study Project).

[28] *See* S. Rep. No. 414, *supra* at 79, 2 Leg. Hist. at 1497:

> The Committee has established a provision in the bill that would provide citizen participation * * * modeled on the provision enacted in the Clean Air Amendments of 1970. As in that Act the provision in this bill is carefully restricted to actions where violations of standards and regulations or a failure on

> The Clean Air Act, from which the Clean Water Act took the phrase "is * * * in violation," * * * provided for injunctive relief only. Alertness of concerned citizens * * * was of moment, but of secondary importance; even when, in enacting the Clean Water Act, Congress added penalties, such were to go to the government. *There was no change in purpose.* Rather, House and Senate Reports on the Clean Water Act characterize the addition of civil penalties as simply a modification of the citizen's action for injunction authorized under the Clean Air Act. [807 F.2d at 1092-93 (emphasis supplied).]

In the face of this legislative history, and the plain language of the statute, respondents rely on a stray comment by one legislator in a written statement inserted into the Congressional Record. Although Senator Muskie's written insert did indicate that a citizen may bring an action against a person "who is alleged to be, or to have been, in violation," 118 Cong. Rec. 33700 (1972), 1 Leg. Hist. at 179, "[t]he short answer is that Congress did not write the statute that way." *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979). On the contrary, the statutory language actually adopted by Congress limited citizen suits to those against a person "who is alleged to be in violation of" the Act. 33 U.S.C. § 1365(a).[29]

> the part of officials to act are alleged. One modification would allow the Courts to impose civil penalties provided as a result of actions brought by citizens.

See also H.R. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972), 1 Leg. Hist. at 820 ("Section 505 closely follows the concepts utilized in * * * the Clean Air Act. However, this legislation authorizes the courts to impose civil penalties, as well as injunctive relief").

[29] It is important to recognize that Senator Muskie's comment is not an interpretation of the statutory language, nor a gloss on it. It is rather an addition to the exact language enacted by Congress. Congress did not, however, enact the addition. Relying on the written insert "would be * * * permitting one member to override the intent of Congress as expressed in the language of the statute." *Monterey Coal Co.* v. *Federal Mine Safety and Health Review Comm'n*, 743 F.2d 589, 598 (7th Cir. 1984).

Reliance upon Senator Muskie's written insert would be peculiarly inappropriate in this instance. The Senate passed the conference bill within minutes of Senator Muskie's oral remarks, and thus did not have any opportunity to consider the written insert. 118 Cong. Rec. 33718 (1972). *The oral remarks did not contain the "or to have been" language.*[30] The stray comment in the written insert is the only item in the voluminous legislative history that departs from the abatement purpose expressed throughout the legislative materials.[31] It provides an excellent example of why, as this Court has repeatedly emphasized, courts should not rely on such remarks, particularly "one isolated remark by a single Senator," in seeking to discern legislative intent. *Weinberger* v. *Rossi*, 456 U.S. 25, 35 (1982). This is particularly true when the stray remark is directly contrary to the plain language of the statute and every other indication of intent in the legislative history.[32]

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[30] In his oral remarks, Senator Muskie simply noted that "[c]itizen suits can be brought to enforce against both continuous and intermittent violations." 118 Cong. Rec. 33693 (1972), 1 Leg. Hist. at 163. As noted, Gwaltney agrees that a permit holder may be considered "to be in violation" on the basis of ongoing intermittent violations as well as continuous violations. *See supra* at 16-18. Nothing in Senator Muskie's spoken words suggests a departure from the statutory language requiring an ongoing violation.

[31] The Conference Report—which the Senate was considering when Senator Muskie made his remarks—simply reiterates the statutory language, noting that citizen suits may be brought against those "alleged to be in violation of an effluent limitation." S. Rep. No. 1236, 92d Cong., 2d Sess. 145 (1972), 1 Leg. Hist. at 328. It does not contain the "or to have been" language of Muskie's written insert, or any similar language suggesting jurisdiction over past violations. There was no indication whatsoever during House consideration of the Conference Report that citizen suits could be brought for purely past violations. *See* 118 Cong. Rec. 33747-67 (1972), 1 Leg. Hist. at 225-279.

[32] The court below considered itself justified in ascribing talismanic significance to the comments of a single legislator because the legislator was Senator Muskie, a sponsor of the Clean Water Act. App. at 14a n.13. As this Court has often noted, however,

Permitting citizen suits seeking penalties for purely past violations would also contravene the clear congressional intent to limit the impact of citizen suits on the federal courts. In *Middlesex County*, this Court recognized that the citizen suit provision in the Clean Air Act—the model for the provision at issue in this case—was defended against the charge that it "'may burden the courts unduly'" on the ground that it offered "'no hope of financial gain and the very real prospect of financial loss'" for the citizen plaintiff. 453 U.S. at 18 n.27 (quoting 116 Cong. Rec. 33104 (1970) (Sen. Hart)).[33] Expanding the scope of the citizen suit provision to include suits for purely past violations would, contrary to the intent of Congress, provide a concrete financial incentive for citizen suits in federal court.

Penalties under the Act are payable to the United States Treasury, not to citizen plaintiffs. *See* S. Rep. No. 414, *supra* at 79, 2 Leg. Hist. at 1497 ("any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant"); H.R. Rep. No.

"[t]he contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history." *Weinberger* v. *Rossi*, 456 U.S. at 35 n.15. *See Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. at 118; *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979). The First Circuit declined to sanction citizen penalty actions for purely past violations on the strength of Senator Muskie's remarks, noting that "[w]ith due respect to Senator Muskie, we do not think an ambiguity is to be created out of whole cloth by his individual remarks." *Pawtuxet Cove*, 807 F.2d at 1093 n.3. Indeed, as two commenators have noted, Senator Muskie's "enthusiasm may explain his expansion of the statutory language." Schwartz & Hackett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 Natural Resources Lawyer 327, 348 (1984). Sanctioning such an expansion on the basis of an isolated comment in a written insert in the Congressional Record "would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President." *Regan* v. *Wald*, 468 U.S. 222, 237 (1984).

[33] *See also City of Highland Park* v. *Train*, 519 F.2d 681, 690-691 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976).

911, *supra* at 133, 1 Leg. Hist. at 820 ("penalties imposed would be deposited as miscellaneous receipts in the treasury and not be recovered by the citizen bringing the suit"). However, as demonstrated in several *amicus curiae* briefs, the prospect of large penalties is all too often used as leverage to obtain settlements benefiting the citizen plaintiffs. Indeed, it is *only* through settlement that the citizen plaintiff obtains funds (other than attorneys fees) or control over funds, since any judgment goes to the Government.[34] It is common knowledge in the industry that citizen suits are often settled by contributions to the plaintiff groups bringing suit or to projects sponsored by those or other groups.[35]

Such settlements circumvent the clear intent of Congress that penalties under the Act go to the Treasury. The problem is illustrated by a settlement involving the two respondents in this case. Respondents recently settled a citizen penalty action against Bethlehem Steel Corporation, pursuant to which Bethlehem agreed to pay $1.5 million—not to the Treasury, but to "a third party environmental fund manager * * * designated by NRDC and CBF * * *."[36] The funds are to be used to help

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[34] Defendants have an incentive to settle in light of the size of the penalties that might be imposed and because there typically are no issues of liability to litigate—the DMRs generally establish liability.

[35] *See* Boyer & Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 Buffalo L. Rev. 833, 840, 932-933 (1985); Miller, *Private Enforcement of Federal Pollution Control Laws: Part III*, 14 Env't L. Rep. (ELI) 10407, 10426 (1984); Environmental Law Institute, *An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes* V-16 (Sept. 1984); Schwartz & Hackett, 17 Natural Resources Lawyer at 359. The United States recognized that this is a serious problem in the *amicus* brief it filed below. *See* Br. at 26 n.18 ("parties to a private enforcement action could attempt to circumvent the court's penalty assessment and unjustly enrich the plaintiffs at the expense of the Treasury").

[36] *Chesapeake Bay Foundation and Natural Resources Defense Council, Inc.* v. *Bethlehem Steel Corp.*, Civ. No. Y-84-1620 (D. Md.),

restore and protect the Chesapeake Bay. While Gwaltney applauds this objective, Bethlehem's payment should have gone to the Treasury, not to a private fund managed by a designee of the citizen plaintiffs. And the decision on how to spend funds meant for the Treasury should have been made by Congress through the appropriations process and not by private parties. Congress could well have decided that the funds be used not for the Bay but for Lake Michigan, or the Mississippi River, or not for environmental projects at all.[37] The settlement process encouraged by permitting citizen plaintiffs to sue for purely past violations establishes such plaintiffs not only as "private attorneys general" but as private chairpersons of appropriations committees as well.[38] Such a result undermines this Court's conclusion in *Middlesex County* that the Act did not create a private right of action, and erects the citizen suit as a potent fundraising device for private organizations—a far cry from Senator Bayh's description of "[t]hese sorts of citizen suits—in which a citizen can obtain an injunction but cannot obtain money damages for himself." 118 Cong. Rec. 33717 (1972), 1 Leg. Hist. at 221.

Consent Decree ¶ 6 (Feb. 12, 1987). Bethlehem also consented to pay $500,000 directly to the NRDC and CBF in "settlement" of their "costs and fees." *Id.* ¶ 7.

[37] *See* Boyer & Meidinger, 34 Buffalo L. Rev. at 932-933 ("For the plaintiff groups, the prospect of investing the money in environmental restoration or improvement is usually preferable to having it disappear into the federal treasury, where it would almost surely be diverted to different uses").

[38] Requiring settlements to be reviewed by enforcement authorities does not cure these problems. Such a requirement would do nothing about the problem of settlements after notice but prior to the institution of suit. In addition, the fact that EPA or state enforcement authorities concur in a private party's conclusion about how to spend funds meant for the Treasury is hardly justification for circumventing the statutory requirement. EPA itself could not settle cases by having funds paid into EPA's budget for use in promoting environmental projects.

The prospect of securing settlements based on purely past violations may account for an already significant and burgeoning burden on the federal courts. The Senate Committee on Environment and Public Works noted recently that "[i]n the past two years, the number of citizen suits to enforce NPDES permits has surged so that such suits now constitute a substantial portion of all enforcement actions filed in Federal court under this Act." S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985). Since 1983 alone, some 600 notices of intent to sue have been filed by citizen plaintiffs.[39] As of January 1984, 65,000 permits had been issued under the Clean Water Act.[40] As noted, violations of effluent limits in those permits must be reported by the permit holders themselves in DMRs, required by law to be made available to the public and generally sufficient to establish the violations.[41] As the Act was interpreted below, "any citizen" with standing need only look up the DMRs of any one of the thousands of permit holders, find a violation—no matter how isolated, no matter how old—and file suit, seeking penalties of up to $25,000 per day for each violation.[42] Congress, of

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[39] EPA compiles and maintains a log of such notices. Until recently, this was the only notice required to be filed with the Government. The Water Quality Act of 1987 added the requirement that citizen plaintiffs serve a copy of their complaint on the Attorney General and the Administrator. Pub. L. No. 100-4, § 504, 101 Stat. 7, 75.

[40] *Hearings on Implementation of the Federal Clean Water Act Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation*, 98th Cong., 2d Sess. 4-5 (March 7, 1984) (statement of Hugh J. Wessinger, General Accounting Office).

[41] 33 U.S.C. § 1318; 40 C.F.R. § 122.41(l)(4). *See United States* v. *Ward*, 448 U.S. 242 (1980); JA 58.

[42] This result is particularly troubling in view of the holding below—which we believe to be erroneous but which is not challenged here—that a violation of a single monthly limit constitutes thirty violations instead of one, resulting in a maximum penalty of $750,000 rather than $25,000. *See* App. 18a-22a. The maximum penalty was increased by the Water Quality Act of 1987, Pub. L.

course, did not supply any statute of limitations, since it did not contemplate citizen suits for past violations, so the citizen plaintiff could reach as far back as a court permitted.[43] The citizen plaintiff would have every confidence of prevailing on liability and recovering all attorneys fees and expenses, as well as securing a settlement for its own benefit, either directly or through a third-party recipient of its choice.

The opportunity to file such a suit would exist under practically *every* permit, since the most exemplary treatment system is not expected to achieve 100 percent compliance with effluent limits. EPA's policy in establishing effluent limits ensures that isolated violations will occur under most permits:

> The Agency traditionally has recognized that it must take variability into account in establishing effluent limitations, and in recognition that *100 percent compliance is theoretically impossible*, the Agency has generally set daily effluent limitations which would be met approximately 99 percent of the time. [47 Fed. Reg. 24536 (June 4, 1982) (emphasis supplied).]

Congress expressly recognized during its most recent amendment of the Act that "EPA sets effluent limitation

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No. 100-4, § 313, 101 Stat. 7, 45, from $10,000 per day of violation to $25,000 per day for each violation. *See* note 8, *supra*.

[43] Courts that have misread the Act to permit citizen suits for purely past violations have been compelled, in the absence of a limitations provision, to struggle with the vexing issue of finding an appropriate limitations period to "borrow" for such litigation, with widely divergent results. Some courts have gone so far as to hold that there is *no* limitations period for citizen suits. *See Student Public Interest Research Group* v. *P.D. Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074, 1083-85 (D.N.J. 1986). Others have borrowed the five-year limitations period in Federal law for civil penalty actions, *see Sierra Club* v. *Simkins Industries, Inc.*, 617 F. Supp. 1120, 1124-25 (D. Md. 1985), while still others have borrowed limitations periods from state law. *See Sierra Club* v. *Chevron U.S.A., Inc.*, No. CV85-1851 (C.D. Cal., Jan. 14, 1986), *app. pending*, No. 86-6287 (9th Cir.).

guidelines * * * at levels which well-operated plants are statistically expected to exceed a certain small percentage of the time (usually one or five percent) over the long-term." H.R. Rep. No. 189, 99th Cong., 1st Sess. 33 (1985). *See Marathon Oil Co.* v. *Environmental Protection Agency*, 564 F.2d 1253, 1266 (9th Cir. 1977); *American Petroleum Institute* v. *Environmental Protection Agency*, 661 F.2d 340, 350 (5th Cir. 1981) ("even a facility employing the best available equipment will occasionally exceed discharge limitations").[44] Permitting citizen suits for purely past violations would thus transform what Congress intended as a "supplement" of "limited nature" to government efforts to secure abatement into a practically limitless device for private organizations to obtain funds through the federal courts, based not only on federal claims but pendent state claims as well.[45]

The holding of the court below also undermines the objectives of the Clean Water Act by permitting citizen suits to interfere with the primary enforcement responsibilities of States and the EPA under the Act. There is no doubt that Congress intended citizen suits to supplement government efforts to abate pollution, and indeed to

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[44] *See generally* Brief Amicus Curiae of the Chamber of Commerce of the United States, *et al.*

[45] The *Hamker* court noted this additional incentive to suit exacerbated by the holding below:

> If section 1365 were interpreted as permitting citizen suits for civil penalties for past violations, all state damage claims which could be brought under pendent jurisdiction could be litigated in a federal forum, thus undermining congressional intent to limit the burden on the district courts. Since the Act provides for awards of attorney's fees and expenses, there would be a substantial incentive to bring suit under the Act rather than in state court. [756 F.2d at 396.]

See Miller, *Private Enforcement of Federal Pollution Control Laws: Part II*, 14 Env't L. Rep. (ELI) 10063, 10079 (1984) (requirement that penalties be paid to Treasury rather than citizen plaintiffs "is easily circumvented in negotiated settlements * * * by trading penalties requested in federal claims for damages alleged in pendent state claims").

spur government action when necessary to stop pollution. Congress did not, however, intend to permit citizens to exhume purely past violations, and bring penalty actions on the basis of such violations. Such suits do not help abate pollution—by definition, the problem already has been abated. Instead, they actually interfere with government efforts to promote compliance with the Act.

Congress was sufficiently concerned about this problem that it required citizen plaintiffs to provide government authorities a sixty-day notice of an intent to sue, specified that government enforcement actions preclude citizen suits, and granted the Administrator authority to intervene as of right in citizen suits. 33 U.S.C. § 1365(b), (c).[46] These safeguards may be adequate to ensure consistency in government and citizen enforcement so long as citizen suits are limited to ongoing violations. But permitting citizen suits for purely past violations would clearly overwhelm the ability of EPA and the States to ensure that such suits do not interfere with effective implementation of the Act. EPA and the States would be required to devote scarce time and resources—better spent on their own enforcement efforts and regulatory activities—to review the hundreds of citizen suit notices and complaints, bring suit or intervene to preclude or ameliorate inappropriate citizen actions, and scrutinize and comment upon countless proposed consent judgments. Either government enforcement itself or consistency between government and citizen efforts would inevitably suffer, undermining the goal of the Clean Water Act.[47] That goal was "to restore

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[46] More recently, Congress added the requirements that the citizen plaintiff serve a copy of the complaint on the Attorney General and Administrator, and that the Attorney General and Administrator receive a copy of any proposed consent judgment forty-five days prior to its entry. Water Quality Act of 1987, Pub. L. No. 100-4, § 504, 101 Stat. 7, 75.

[47] In the case of purely past violations that government authorities have decided do not warrant court action, the State or EPA—to ensure consistency in enforcement—would be required to sue for the purpose of obtaining *no relief*—a peculiarly perverse waste of scarce regulatory resources.

and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), not to restore and maintain the environmental litigation bar.[48]

III. Jurisdiction Cannot Be Sustained on the Basis of Mere Allegations

Respondents argued below that jurisdiction could be sustained over their civil penalty action on the alternate ground that they made a good faith *allegation* that Gwalt-

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[48] Reading the citizen suit provision as written avoids the necessity of confronting the serious constitutional issues that would arise if respondents' contrary interpretation were accepted, as elaborated by several *amici*. *See United States* v. *Clark*, 445 U.S. 23, 27 (1980) ("It is well settled that this Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided"). Permitting citizens to sue for penalties payable only to the Treasury for purely past violations would contravene the standing requirements of Article III. To satisfy those requirements, a plaintiff must show "an injury to himself that is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *see Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Even assuming the existence of an injury to the citizen plaintiff, penalties payable only to the *Government* for purely past violations cannot redress *that injury* to the *plaintiff*. In the case of an ongoing violation, on the other hand, penalties can be imposed in connection with abatement, which redresses the actual injury to the citizen plaintiff.

In addition, authorizing private citizens to sue for purely past violations—when they are entitled to no relief themselves—contravenes the separation of powers by permitting courts and private citizens to intrude upon the Executive's responsibility to "take care that the laws be faithfully executed." U.S. Const. Art. II, § 3. *See generally* Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 897 (1983). Congress may not vest that responsibility in private citizens unaccountable to the electorate. Congress may grant such citizens the right to redress injury to themselves—as in the case of suits brought for ongoing violations—but the essentially prosecutorial function of seeking penalties payable to the Government for purely past violations must reside—if anywhere—with the accountable governmental authorities themselves.

ney was "in violation" when they filed suit. The United States as *amicus curiae* also contended that citizen suits seeking penalties could be maintained on the basis of a good faith allegation of an ongoing violation, even if the allegation turns out in fact to be untrue. The court below declined to adopt this theory and expressly did "not decide whether plaintiffs in this case made their allegations of continuing violations in good faith." App. 8a n.9.

The statutory requirement that the defendant "be in violation" of an effluent standard or limitation is a jurisdictional prerequisite to a citizen penalty action. The Government recognizes as much, since it agrees that a citizen suit may generally not be maintained seeking penalties for purely past violations.[49] Respondents and the Government argue, however, that this jurisdictional limitation written into the statute by Congress is a mere rule of pleading, easily overcome simply by alleging a continuing violation.

This Court has frequently held that jurisdictional allegations—if controverted—must be proved, and that the party seeking to invoke jurisdiction has the burden of proof.[50] As the Court noted in *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 612 n.28 (1979), "the settled rule" is that "the party claiming that a court has power to grant relief in his behalf has the burden of persuasion on the jurisdictional issue, * * * especially when he is proceeding in a court of limited jurisdiction." *See Bender* v. *Williamsport Area School Dist.*, 106 S. Ct. 1326, 1334 (1986).

The jurisdictional prerequisite of an ongoing violation is one of the "conditions which must be met by the party

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[49] *See* Brief for the United States as Amicus Curiae Supporting Appellants at 25 n.17, *Sierra Club* v. *Shell Oil Co.*, *supra* (citizen plaintiffs cannot bring "penalty-only actions against violators who have attained compliance before suit is filed").

[50] *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *KVOS, Inc.* v. *Associated Press*, 299 U.S. 269, 278 (1936); *Thomson* v. *Gaskill*, 315 U.S. 442, 446 (1942).

who seeks the exercise of jurisdiction in his favor." *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. at 189. The fact that the federal courts may exercise only that limited jurisdiction conferred by the Constitution and Congress

> precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. [*Id.*]

When jurisdictional allegations are challenged—as they were here—the District Court must determine whether the facts support the allegations necessary to sustain jurisdiction. "[W]hen a question of the District Court's jurisdiction is raised, * * * the court may inquire, by affidavits or otherwise, into the facts as they exist." *Land* v. *Dollar*, 330 U.S. 731, 735 n.4 (1947). Here, respondents stipulated that "the facts as they exist" are that Gwaltney ceased violating its permit a full month before suit was filed. Any allegation that Gwaltney was in violation at that time cannot sustain jurisdiction, since "the facts as they exist" conclusively prove otherwise.

Respondents and the Government focus on the word "alleged," but there is no evidence in the legislative history that Congress—presumptively aware of the "settled rule" that jurisdictional allegations must be proved if challenged—intended to render the "in violation" limitation meaningless by permitting it to be overcome simply by alleging that which cannot be sustained. *Any* civil action is commenced by allegations in a complaint, and the use of the word "alleged" in the citizen suit provision does not alone evince an intent to displace the usual rules governing pleading and jurisdiction.[51]

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[51] The Government's position is apparently based on a concern that intermittent violators of the Act not fortuitously escape liability in citizen suits, simply because they do not actually exceed

This is particularly true since the key language on which the Government and respondents rely was not crafted with civil penalties in mind. The language was taken *in haec verba* from the citizen suit provision of the Clean Air Act, which does not authorize civil penalties. Congress could hardly have intended the word "alleged" to create a special rule of pleading jurisdiction in citizen penalty actions, when such actions were not even before Congress at the time it devised the pertinent language. Gwaltney's interpretation of the citizen suit provision, on the other hand, is fully consistent with the genesis of the statutory language. Upholding jurisdiction to award penalties when the permit holder is "in violation" treats the penalty provision as a supplement to injunctive relief, and does not require the word "alleged" to carry a jurisdictional significance that could not have been in Congress' mind when it incorporated the language from the Clean Air Act into the Clean Water Act.

There is nothing unusual in requiring jurisdictional facts to be proved if challenged. That is the typical approach in any case in which Congress has limited the grant of jurisdiction in federal court.[52] Indeed, it is the typical approach with respect to other limitations in the citizen suit provision itself. An allegation that the citizen plaintiff has provided the statutorily required notice prior to suit is not the end of the matter if there is a challenge by the defendant. The allegation must be proved. *See*

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a permit limit on the day of suit. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Appellees below at 20. As noted, the plain language of the citizen suit provision can readily cover such intermittent violations, and accordingly there is no need to depart from the settled rules governing jurisdictional allegations to meet that case.

[52] *See, e.g., Pettis* v. *Morrison-Knudsen Co.*, 577 F.2d 668 (9th Cir. 1978); *Crowder* v. *Fieldcrest Mills, Inc.*, 569 F. Supp. 825 (M.D.N.C. 1983). The same is true with respect to constitutional limitations. An allegation of diversity of citizenship, even if made in reasonable good faith, cannot sustain jurisdiction if diversity is *in fact* lacking. *See Gilbert* v. *David*, 235 U.S. 561 (1915); *O'Toole* v. *Arlington Trust Co.*, 681 F.2d 94 (1st Cir. 1982).

Walls v. *Waste Resource Corp.*, 761 F.2d at 317. An allegation that the required sixty days have elapsed and that neither EPA nor the State has taken enforcement action will not sustain jurisdiction if it turns out that the government authorities did in fact commence such a suit, regardless of the good faith of the allegation to the contrary. By the same token, an allegation that the defendant is "in violation" cannot support jurisdiction if it turns out to be untrue.[53]

Even if the complaint alleged an ongoing violation—which it does not[54]—such an allegation cannot be considered reasonable under the circumstances. Chlorine violations ceased *twenty months* prior to suit, and—aside from

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[53] Respondents and the Government rely heavily on cases sustaining jurisdiction in diversity actions on the basis of the amount in controversy alleged by the plaintiff, even if the plaintiff ultimately recovers less than the jurisdictional amount. *See* Brief for the United States as Amicus Curiae Supporting Appellees below at 19. This approach, however, was developed to avoid the waste inherent in the dismissal of a suit after decision on the merits and judgment simply because of the amount of recovery—an issue wholly collateral to the underlying cause of action—and is not authority for permitting jurisdictional prerequisites such as the "in violation" requirement to be circumvented by mere pleading.

[54] Respondents alleged that Gwaltney had violated its permit limits in the past, as set forth in respondents' notice letter. Complaint ¶ 16, App. 82a. That letter was dated February 29, 1984, and accordingly could not constitute an allegation that Gwaltney was in violation when suit was filed over three months later. Respondents also alleged that Gwaltney violated its permit as shown in DMRs attached to the complaint and incorporated by reference. Complaint ¶ 17, App. 82a-83a. Those DMRs did not show any violation after May 15, 1984—a full month before suit was filed. Accordingly, they also could not constitute an allegation—good faith or otherwise—of an ongoing violation. Finally, respondents alleged that Gwaltney "will continue to violate" its permit. Complaint ¶ 18, App. 83a. This allegation of *future* violations falls far short of an allegation of an ongoing violation when suit was filed. *See Hamker*, 756 F.2d at 397 (allegation that condition that resulted in past discharge persists held not to constitute "an allegation that the defendant *is presently* violating an effluent standard, limitation or order") (emphasis supplied).

start-up exceedences—fecal coliform violations ceased almost *two years* prior to suit. App. 87a; JA 110, 116-117. Even the start-up exceedences for fecal coliform ceased four months before suit was filed. JA 117. There was no basis when respondents filed suit for a good faith allegation of present or ongoing violations of fecal coliform/chlorine.

Nor can the purely past TKN violations support an allegation of present or continuing violations. The TKN violations ceased before suit because of the new, state-of-the-art treatment system that Gwaltney installed. Respondents knew, of course, that Gwaltney had installed such a system. In light of the new system—approved by the Board—Gwaltney's record of *past* TKN violations was not at all indicative of present, ongoing violations. The unavoidable TKN violations caused by the start-up of Gwaltney's new system cannot form the basis of any good faith allegation of an *ongoing* violation, and even those violations ceased—as respondents stipulated—a month prior to suit.

The court below expressly did not decide whether any allegation of an ongoing violation was made in good faith. App. 8a n.9. The District Court stated that an allegation of continuing violation "appears to have been made fully in good faith," JA 83 n.8, but that tentative conclusion was limited solely to TKN violations. *See* JA 84 n.8 (discussion of good faith allegation concerned "one of the two major violation problems for which this suit was brought"). Even if jurisdiction could be sustained on the basis of mere allegations that turn out to be untrue, and even if the District Court were correct that an allegation of an ongoing *TKN* violation was reasonable, jurisdiction to impose penalties would exist only with respect to *that* ongoing violation. *See Sierra Club* v. *Kerr-McGee Corp.*, 23 Env't Rep. Cas. (BNA) at 1690.

It would be a curious result if suit could not be maintained seeking penalties for purely past violations for which no allegation of an ongoing violation could be made,

but that penalties could be imposed for those same past violations in a suit brought alleging an ongoing violation of a *separate* effluent limit. The District Court's tentative conclusion of a good faith allegation of an ongoing violation was limited to TKN, but $1 million of the $1.3 million penalty it imposed was based on fecal coliform/chlorine violations. Not only are the effluent limits for these substances separate and distinct, but the treatment systems for the two are also separate and distinct. Accordingly, an ongoing TKN violation—which did not exist and which could not reasonably be alleged to have existed—cannot form the basis for imposing penalties for purely past fecal coliform/chlorine violations.[55]

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The Court should be mindful of the very practical difficulties confronting a company such as Gwaltney, whose normal operations unavoidably generate non-toxic organic wastes. Gwaltney did not try to "make do" with the inadequate treatment system it inherited, or conceal the problems from the authorities or the public in any way. It recognized that only a new treatment system could deal with its business's effluent problems effectively and over the longterm, and accordingly it incurred the substantial capital expense of installing such a system. Gwaltney did so after consultation with and approval by the appropriate regulatory authorities, with both the authorities and the company knowing full well that start-up of the new system would inevitably result in permit exceedences. Gwaltney dutifully reported each start-up exceedence until the new system became fully effective and all violations ceased.

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[55] In any event, the District Court's statements on the reasonableness of respondents' allegations were based on the pleading standard applied to amount in controversy questions. As noted, that standard is not applicable here. At the very least, if this Court accepts the argument that jurisdiction can be based on reasonable allegations, Gwaltney would be entitled to a remand for a factual determination of whether respondents satisfied the appropriate standard of reasonableness.

Respondents—after leafing through Gwaltney's reports, along with hundreds of others—sent the company a sixty-day notice letter and, when that period elapsed, filed suit, using Gwaltney's own DMRs as the basis for recovery. Under respondents' theory it made no difference whether Gwaltney had one violation or thousands; whether the violations occurred when suit was filed or five years before; whether the violations were deliberate, part of a pattern, and chronic, or unavoidable, isolated, and incapable of repetition; or whether the permit holder had cured the causes of the violations or ignored them altogether. If Gwaltney had settled, respondents would control the use of the settlement funds, contrary to the clear intent of Congress. If Gwaltney did not settle, it ran the risk—in light of the extraordinary method of computing penalties utilized by the District Court—of millions of dollars in penalties.

We respectfully submit that this could not have been—and was not—the way Congress intended for this statute to operate. Congress wanted violations to stop. Citizen suits were intended as a limited supplement to government efforts to secure abatement. If a company is to be assessed substantial penalties in a citizen suit regardless of whether its violations are ongoing or have completely abated, the citizen suit provision will have been turned on its head, with untoward results Congress did not intend and indeed was anxious to avoid.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the complaint dismissed.

Respectfully submitted,

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